

**COOPERATIVE IMPROVEMENT AGREEMENT  
OR99W and SW 72<sup>nd</sup>/OR 217/I-5 and SW Haines  
68th / I-5 SB Haines Street Signal  
City of Tigard, WalMart Store #5935-00**

**THIS AGREEMENT** is made and entered into by and between the STATE OF OREGON, acting by and through its Department of Transportation, hereinafter referred to as "State," the City of Tigard, acting by and through its elected officials, hereinafter referred to as "City," and WalMart Real Estate Business Trust, a Delaware Statutory Trust, acting by and through its designated officials, hereinafter referred to as "Developer," all herein referred to individually or collectively as "Party" or "Parties."

**RECITALS**

1. Pacific West Highway (OR 99W), and Beaverton-Tigard Highway (OR 217) are part of the state highway system under the jurisdiction and control of the Oregon Transportation Commission (OTC). Dartmouth Street, 68<sup>th</sup> Avenue, 72<sup>nd</sup> Avenue, Beveland Street, Gonzaga Street, Hampton Street, Hunziker Street, Varns Street, Pfaffle Street, and Hermoso Way are a part of the city street system under the jurisdiction and control of City.
2. By the authority granted in Oregon Revised Statutes (ORS) 190.110, 366.572 and 366.576, State may enter into cooperative agreements with counties, cities and units of local governments for the performance of work on certain types of improvement projects with the allocation of costs on terms and conditions mutually agreeable to the contracting parties.
3. By the authority granted in ORS 374.305 and 374.310, State may regulate construction of any approach onto the state highway and require mitigation for approaches that the State determines to be in the best interest of the traveling public.
4. Oregon Administrative Rule 660-12-0060 requires local jurisdictions to put in place measures to assure that allowed land uses are consistent with the function, capacity and performance standards of affected transportation facilities when they amend comprehensive plans or land use regulations .
5. State, by ORS 366.220, is vested with complete jurisdiction and control over the roadways of cities taken for state highway purposes. By the authority granted by ORS 373.020, the jurisdiction extends from curb to curb, or, if there is no regular established curb, then control extends over such portion of the right of way as may be utilized by State for highway purposes. Responsibility for and jurisdiction over all other portions of a city street remains with the City.
6. By the authority granted in ORS 810.080 State has the authority to establish marked pedestrian crosswalks on its highway facilities.

7. By the authority granted in ORS 810.210, State is authorized to determine the character or type of traffic control devices to be used, and to place or erect them upon state highways at places where State deems necessary for the safe and expeditious control of traffic. No traffic control devices shall be erected, maintained, or operated upon any state highway by any authority other than State, except with its written approval. Traffic signal work on this Project will conform to the current State standards and specifications.
8. By the authority granted in ORS 366.425, State may accept deposits of money or an irrevocable letter of credit from any county, city, road district, person, firm, or corporation for the performance of work on any public highway within the State. When said money or a letter of credit is deposited, State shall proceed with the project. Money so deposited shall be disbursed for the purpose for which it was deposited.
9. This Agreement identifies funding and maintenance obligations for State, City and Developer as the Project undergoes development and construction.

**NOW THEREFORE**, the premises being in general as stated in the foregoing Recitals, it is agreed by and between the Parties hereto as follows:

#### **TERMS OF AGREEMENT**

1. Under such authority, State, City, and Developer agree that Developer shall perform the following upon approval by State of required permits, including, "Permit to Occupy or Perform Operations upon a State Highway":
  - a. Removing one of the two OR99W southbound (SB) to SW 72 Avenue SB left-turn lanes;
  - b. Adding a third SB lane on OR99W just north SW 72nd Avenue and ending it with a drop lane onto OR217 northbound (NB) (This lane onto OR217 currently develops between the 78th and OR217 traffic signal);
  - c. Allowing NB OR99W passenger vehicles to do a u-turn at the SW 72nd Avenue intersection;
  - d. Placing a raised traffic separator for the NB OR99W left turn lane that turns into Fred Meyer;
  - e. Placing a raised median for a small distance on OR99W's north leg at the SW 74th Avenue intersection;
  - f. Placing a raised median on OR99W from SW 74th Avenue to SW Pfaffle Street where the raised median will control movements on the SW Pfaffle Street approach;
  - g. Placing a raised traffic separator for the SB OR99W left turn lane that turns into SW Dartmouth Street. U-turn movement will not be allowed;
  - h. Placing a raised separator for the NB OR99W left turn lane that turns into SW 78th Avenue and allowing u-turns for passenger vehicles;
  - i. Placing a raised median on OR99W from the left turn lane that goes to SW 78th to the crosswalk of the OR217 NB Ramp Terminal;

- j. Lengthening the OR99W NB right turn lane that goes onto SW Dartmouth Street;
- k. Converting the NB SW 72nd Avenue right-turn lane onto OR217 at the SW Varnes Street intersection into a shared through / right-turn lane;
- l. Adding a second NB lane on SW 72nd Avenue from SW Varnes Street to SW Beveland Street;
- m. Removing the traffic signal at the SW 72nd Avenue / SW Hampton Street intersection and making SW Hampton Street a right-in / right-out only approach. The signal will become property of ODOT and will be delivered to an ODOT maintenance yard (as determined by ODOT's Maintenance and Operations manager) as a Project expense;
- n. Widening the OR217 NB Exit Ramp at SW 72nd Avenue;
- o. Installing a signal on Dartmouth Street at Walmart site access (City owned traffic signal);
- p. Installing a signal on Dartmouth Street at 72<sup>nd</sup> Avenue (City owned traffic signal);
- q. Installing a signal at the 68th / I-5 SB Haines Street ramps (ODOT owned traffic signal);
- r. Widening Dartmouth between Walmart access and the Costco signal; and
- s. Making curb improvements on the SE corner of the Dartmouth Street / OR99W intersection that includes a patterned concrete buffer and high rolled curbs to accommodate freight traffic on the right-turn which City will maintain.

Collectively, these improvements shall hereinafter be referred to as "Project." The location of the Project is approximately as shown on the map attached hereto, marked Exhibit A, and by this reference made a part hereof.

- 2. The Project will be financed entirely by Developer at an estimated cost of \$5,100,000 in Developer funds. The estimate for the total Project cost is subject to change. Developer shall be responsible for all Project costs including those beyond the estimate above. No public funds shall be used for this Project.
- 3. This Agreement shall become effective on the date all required signatures are obtained and shall remain in effect for the purpose of ongoing maintenance and power responsibilities for the useful life of the facilities constructed as part of the Project, except that the Developer Obligations (except indemnifications and any warranties or other representations) shall terminate upon the completion of the Project. The useful life is defined as fifteen (15) calendar years. The Project shall be completed within five (5) calendar years following the date of final execution of this Agreement by all Parties.

## **CITY OBLIGATIONS**

- 1. City shall, upon successful completion and acceptance of Project, accept ownership and control of those improvements connected with the operation of City streets.
- 2. City shall maintain the asphaltic concrete pavement surrounding the vehicle detector loops installed in any leg of a city street at a State highway intersection in such a manner as to provide adequate protection for said detector loops. Failure to do so

may result in State requiring City to repair or replace damaged loops at City's expense. City shall also adequately maintain the pavement markings and signing installed in accordance with current State standards along its streets.

3. City shall, at its own expense, be responsible for maintaining improvements constructed on City streets as part of this Project.
4. City shall be responsible for 100 percent of power costs associated with the luminaries installed on City streets as part of this Project. City shall have power company send bills directly to City.
5. City shall be responsible for 100 percent of costs associated with maintaining any landscaped medians built on OR99W as a part of this Project, including landscaping maintenance and water irrigation costs from back of curb to back of curb.
6. City shall be responsible for 100 percent of maintenance and operation costs associated with the new signals installed on Dartmouth Street at the access to the Walmart and at 72<sup>nd</sup> Avenue.
7. Consistent with the 2002 Policy Statement for Cooperative Traffic Control Projects, Agreement 19719, between State and the agencies belonging to the Association of Oregon Counties (AOC) or the League of Oregon Cities (LOC), State and City shall each be responsible for fifty percent (50%) percent of the cost for maintenance, operation and electricity for the signal equipment, excluding the detector loops, on the 68<sup>th</sup> / I-5 SB Haines Street ramps as listed in Terms of Agreement Paragraph 1 subsection q. State shall perform the maintenance and be responsible for payment for signal power to the power company. The power company shall send power bills directly to State. State shall annually bill Agency for its fifty percent (50%) of the combined maintenance, operations and electricity for the Project. This cost split only applies to the 68<sup>th</sup> / I-5 SB Haines Street ramps signal and does not apply to any other signals built as a part of this Project.
8. City grants State and Developer the right to enter onto City right of way for the purpose of construction and performance of maintenance duties as set forth in this Agreement upon proper and timely notice.
9. City services charged to the Project or any cost sharing for maintenance or power arrangements between City and Developer that do not include State, shall be confirmed in a separate agreement between City and Developer and are not a part of this Agreement.
10. If City fails to maintain facilities in accordance with the terms of this Agreement, State, at its option, may maintain the facility and bill City, seek an injunction to enforce the duties and obligations of this Agreement or take any other action allowed by law.

11. City certifies and represents that the individual(s) signing this Agreement has been authorized to enter into and execute this Agreement on behalf of City, under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind City.
12. City's Project Manager for this Project is Kim McMillan, PE, 13125 SW Hall Boulevard, Tigard, OR 97223, 503-718-2642, kim@tigard-or.gov, or assigned designee upon individual's absence. City shall notify the other Parties in writing of any contact information changes during the term of this Agreement.

## **DEVELOPER OBLIGATIONS**

1. Developer shall upon receipt of a fully executed copy of this Agreement and upon a subsequent letter of request from State, forward to State an advance deposit in the amount of \$90,000 for the maintenance costs associated with the State-approved storm water system filter replacement required for the storm water drainage facilities constructed as part of the Project. This advance deposit covers the estimated annual maintenance costs of \$6,000 per calendar year for the term of this Agreement, which is fifteen (15) years.
2. Developer has, as of the date of execution of this Agreement, deposited \$60,000 with State's District 2B office. If State anticipates that the advance deposit will be exceeded, State will notify the Developer and send an additional request with the estimate of costs. State will return any unused funds to the Developer after the Project is completed.
3. This Agreement is conditioned upon Developer obtaining any required permits from State, including, "Permit to Occupy or Perform Operations upon a State Highway" from State's District 2B office, as well as but not limited to, land use permits, building permits, and engineering design review approval from the State and City. Developer agrees to comply with all provisions of said permits, and shall require its contractors, subcontractors, or consultants performing such work to comply with said permits and provisions.
4. Developer shall conduct the necessary field surveys, environmental studies, traffic investigations, preliminary engineering and design work required to produce and provide final plans, specifications and cost estimates for the highway Project; identify and obtain all required permits; perform all construction engineering, including all required materials testing and quality documentation; prepare all bid and contract documents; advertise for construction bid proposals; award all contracts; pay all contractor costs, provide technical inspection, project management services and other necessary functions for sole administration of the construction contract entered into for this Project.
5. Developer shall design and construct the Project in conformance with the current edition of the *ODOT Highway Design Manual* and the *Oregon Standard Specifications for Construction Manual*. Developer understands the Project shall be

designed and constructed to State standards and approved by State prior to construction of Project by Developer.

6. Developer will be required to obtain the services of a registered professional engineer to oversee, accept, and document all construction procedures and certify proper construction was performed pursuant to the Project plan and permit. The registered professional engineer will be required to stamp the "As Constructed Plans" and ensure the Project meets State's required standards. Construction inspection for this Project will be completed by either State inspectors or a private company with state-certified inspectors paid for by Developer.
7. All employers, including Developer, that employ subject workers who work under this Agreement in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage unless such employers are exempt under ORS 656.126. Employers Liability insurance with coverage limits of not less than \$500,000 must be included. Developer shall ensure that each of its contractors complies with these requirements.
8. Developer shall perform the service under this Agreement as an independent contractor and shall be exclusively responsible for all costs and expenses related to its employment of individuals to perform the work under this Agreement including, but not limited to, retirement contributions, workers' compensation, unemployment taxes, and state and federal income tax withholdings.
9. Developer shall, to the extent permitted by the Oregon Constitution and the Oregon Tort Claims Act, indemnify, defend, save, and hold harmless City, the State of Oregon, Oregon Transportation Commission and its members, Department of Transportation, its officers and employees from any and all claims, suits, and liabilities which may occur in the performance of this Project.
10. Notwithstanding the foregoing defense obligations under the paragraph above, neither Developer nor any attorney engaged by Developer shall defend any claim in the name of City or the State of Oregon or any agency of the State of Oregon, nor purport to act as legal representative of City or the State of Oregon or any of its agencies, without the prior written consent of the Oregon Attorney General. City or the State of Oregon may, at anytime at its election assume its own defense and settlement in the event that it determines that Developer is prohibited from defending City or the State of Oregon, or that Developer is not adequately defending City or the State of Oregon's interests, or that an important governmental principle is at issue or that it is in the best interests of City or the State of Oregon to do so. City and the State of Oregon reserve all rights to pursue any claims it may have against Developer if City or the State of Oregon elects to assume its own defense.
11. Developer shall comply with all federal, state, and local laws, regulations, executive orders and ordinances applicable to the work under this Agreement, including, without limitation, the provisions of ORS 279A, 279B and 279C incorporated herein by reference and made a part hereof. Without limiting the generality of the

foregoing, Developer expressly agrees to comply, to the extent applicable, with (i) Title VI of Civil Rights Act of 1964; (ii) Title V and Section 504 of the Rehabilitation Act of 1973; (iii) the Americans with Disabilities Act of 1990 and ORS 659A.142; (iv) all regulations and administrative rules established pursuant to the foregoing laws; and (v) all other applicable requirements of federal and State civil rights and rehabilitation statutes, rules and regulations.

12. Developer is required to pay, on behalf of State, any applicable fee due because of this Project, pursuant to ORS 279C.825, to the Bureau of Labor and Industries. In the event Developer does not pay such fee, and State is required to do so, Developer shall reimburse State such amount, within three (3) business days, upon its request. In addition, Developer agrees to indemnify, hold harmless and reimburse State and its officers, employees and agents for any liability, cost, expense, fine, fee or penalty payable to a private party or governmental entity, including another agency of the State of Oregon resulting from or arising out of this Project, including but not limited to expenses incurred to comply with, to obtain a determination under, or in any other way related to the Prevailing Wage Rate Laws set forth in ORS 279C.800 to 279C.870.
13. If Developer chooses to assign its contracting responsibilities to a contractor, Developer shall inform the contractor of the requirements of ORS 276.071, to the extent applicable.
14. If Developer enters into a construction contract for performance of work on the Project, then Developer will require its contractor to provide the following, and in the event Developer provides construction activities for the Project itself, the Developer is required to provide the following as well:
  - a. Contractor shall indemnify, defend and hold harmless City, and State against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the activities of Contractor or its officers, employees, sub-contractors, or agents under the resulting contract.
  - b. Contractor shall name State and City as third party beneficiaries of the resulting contract.
  - c. Commercial General Liability. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of the Contract, Commercial General Liability Insurance covering bodily injury and property damage in a form and with coverages that are satisfactory to State and City. This insurance shall include personal and advertising injury liability, products and completed operations. Coverage may be written in combination with Automobile Liability Insurance (with separate limits). Coverage shall be written on an occurrence basis. If written in conjunction with Automobile Liability the combined single limit per occurrence shall not be less than

\$1,000,000 for each job site or location. Each annual aggregate limit shall not be less than \$2,000,000.

- d. Automobile Liability. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of the contract, Commercial Business Automobile Liability Insurance covering all owned, non-owned, or hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance (with separate limits). Combined single limit per occurrence shall not be less than \$1,000,000.
  - e. Additional Insured. The liability insurance coverage, except Professional Liability, Errors and Omissions, or Workers' Compensation, if included, required for performance of the Contract shall include State and City and its divisions, officers and employees as "Additional Insured" but only with respect to the Contractor's activities to be performed under the resulting contract. Coverage shall be primary and non-contributory with any other insurance and self-insurance.
  - f. Notice of Cancellation or Change. There shall be no cancellation, material change, potential exhaustion of aggregate limits or non-renewal of insurance coverage(s) without thirty (30) days written notice from the Contractor or its insurer(s) to State, City, and Developer. Any failure to comply with the reporting provisions of this clause shall constitute a material breach of contract and shall be grounds for immediate termination of the resulting contract and this Agreement.
15. Pursuant to the statutory requirements of ORS 279C.380 Developer shall require their contractor to submit a performance bond to Developer for an amount equal to or greater than the estimated cost of the Project.
16. Developer shall, within ninety (90) calendar days of completion or termination without completion of the Project, provide to State permanent mylar "as constructed" plans for work on state highways. If Developer or its consultant redrafts the plans, done in Computer Aided Design and Drafting (CADD) or Microstation, to get the "as constructed" set, and they follow the most current version of the "Contract Plans Development Guide, Volume 1 Chapter 16" <http://egov.oregon.gov/ODOT/HWY/ENGSERVICES/cpdg.shtml>, Developer shall provide to State a Portable Document Format (PDF) file and a paper copy of the plan set.
17. Developer shall, pursuant to OAR Chapter 734, Division 10 ensure that its contractor has been prequalified and registered with the Construction Contractor's Board, to function as the general contractor for the performance of this work. All obligations of the Developer stated in this Agreement shall remain the responsibility of the Developer regardless of whether or not a contractor performs the work. It is the Developer's responsibility to inform any such contractor of its obligations.



18. Developer shall, prior to its advertisement for construction bid proposals, provide the Project final plans and specifications to State's Region 1 Project Services Section for review and written concurrence.
19. The traffic signal plans and specifications must be approved by Office of the State Traffic Engineer. All traffic signal plans and specifications for City signals must be approved by City staff and will be inspected by representatives of the City. All signal equipment must be inspected and tested by State's Traffic Systems Services Unit. Any video detection equipment to be used with the traffic signal will need to be reviewed and approved by the State Traffic Engineer to ensure proper location and usage. State's Region 1 Project Services Section shall coordinate all such review.
20. Developer or its contractor shall follow the Oregon Locate Laws (ORS 757 and OAR 952).
21. For all work being performed on State facilities, Developer shall cause the Project to be designed and constructed in accordance with State standards and shall, upon completion of the Project, release ownership of all traffic signal equipment to State. For all work being performed on City facilities, Developer shall cause the Project to be designed and constructed in accordance with City standards.
22. Developer, or its contractor's electrical inspectors shall possess a current State Certified Traffic Signal Inspector certificate, in order to inspect electrical installations on State highways. The State Region 1 Project Services Section & District 2B Permitting Office shall verify compliance with this requirement prior to construction. Said inspectors must coordinate their traffic inspections with State Region 1 Project Services Section and District 2B and Electrical inspectors during the course of the Project.
23. Developer is responsible for and ensures that all survey monuments recorded with a county and within or adjacent to the highway right of way shall be preserved in accordance with ORS 209.140 and 209.150. Any such monumentation that is damaged or removed during the course of the Project must be replaced in compliance with ORS Chapter 209 stipulations, the State Right of Way Monumentation Policy, and at Developer's own expense. Developer is also responsible, at its own expense, for replacement of any additional State survey marks or other monumentation not recorded with a county that are damaged or removed during the course of the Project. In the event of such replacement, Developer shall contact State's Geometronics Unit for replacement procedures.
24. Developer agrees that right of way identified by State or City that is required to construct the highway and city street improvements as part of the Project, shall be donated by Developer without cost to State or City. Developer shall coordinate State right of way donations through the State Region 1 Right of Way Office.
25. If additional right of way is acquired for State highway right of way purposes as a result of the Project, then a right of way monumentation survey is required as

defined in ORS 209.150 and 209.155. Developer agrees to provide such a survey, at its own expense, following ORS Chapter 209 stipulations, State Right of Way Monumentation Policy, and State's Geometronics Unit review and approval, and to file the legal survey with the appropriate county Surveyor's office as required.

26. In the event any portion of this Project affects railroad right of way, Developer shall be responsible for notifying the appropriate railroad company of the Project, the construction and approval of all required agreements and for all costs associated with railroad related tasks identified above.
27. Developer certifies and represents that the individual(s) signing this Agreement has been authorized to enter into and execute this Agreement on behalf of Developer, under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind Developer.
28. Developer's Project Manager for this Project is Steve Dyer, Walmart, 2001 SE 10<sup>th</sup> Street, Mail Stop 5570, Bentonville, AR, 72716; 479-273-4567; steve.dyer@walmart.com or assigned designee upon individual's absence. Developer shall notify the other Parties in writing of any contact information changes during the term of this Agreement.

## **STATE OBLIGATIONS**

1. State shall, upon execution of the agreement, forward to Developer a letter of request for an advance deposit in the amount of \$90,000 for maintenance costs associated with the storm water filter replacement required for the storm water drainage facilities constructed as part of the Project.
2. Developer has, as of the date of execution of this Agreement, deposited \$60,000 with State's District 2B office. If State anticipates that the advance deposit will be exceeded, State will notify the Developer and send an additional request with the estimate of costs. State will return any unused funds to the Developer after the Project is completed.
3. State shall review and approve all Project plans prior to construction by Developer or its contractor.
4. State shall, upon completion of Project and acceptance of Project by State, accept jurisdiction and control of the state highway facilities constructed as part of the Project.
5. State shall, at State expense, perform and be responsible for maintenance of Project elements on State facilities.
6. State shall maintain the asphaltic concrete pavement surrounding the vehicle detector loops installed in the highway in such a manner as to provide adequate protection for said detector loops.

7. State grants authority to Developer to enter upon State right of way for the construction of this Project as provided for in miscellaneous permit to be issued by State District 2B Office.
8. Consistent with the 2002 Policy Statement for Cooperative Traffic Control Projects, Agreement 19719, between State and the agencies belonging to the Association of Oregon Counties (AOC) or the League of Oregon Cities (LOC), State and City shall each be responsible for fifty percent (50%) percent of the cost for maintenance, operation and electricity for the signal equipment, excluding the detector loops, on the 68<sup>th</sup> / I-5 SB Haines Street ramps as listed in Terms of Agreement Paragraph 1 subsection p. State shall perform the maintenance and be responsible for payment for signal power to the power company. The power company shall send power bills directly to State. State shall annually bill Agency for their fifty percent (50%) of the combined maintenance, operations and electricity for the Project.
9. State's Project Manager for this Project is Bret Richards, PE, PLS, 123 NW Flanders Street, Portland, OR 97209, 503-731-8288, [bret.n.richards@odot.state.or.us](mailto:bret.n.richards@odot.state.or.us), or assigned designee upon individual's absence. State shall notify the other Parties in writing of any contact information changes during the term of this Agreement.

## **GENERAL PROVISIONS**

1. This Agreement may be terminated by mutual written consent of all Parties.
2. State may terminate this Agreement effective upon delivery of written notice to Developer, or at such later date as may be established by State, under any of the following conditions:
  - a. If Developer or City fails to provide services called for by this Agreement within the time specified herein or any extension thereof.
  - b. If Developer or City fails to perform any of the other provisions of this Agreement, or so fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from State fails to correct such failures within ten (10) days or such longer period as State may authorize.
  - c. If Developer or City fails to provide payment of its share of the cost of the Project.
  - d. If State fails to receive funding, appropriations, limitations or other expenditure authority sufficient to allow State, in the exercise of its reasonable administrative discretion, to continue to make payments for performance of this Agreement.
  - e. If federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is

prohibited or State is prohibited from paying for such work from the planned funding source.

3. City may terminate this Agreement effective upon delivery of written notice to Developer, or at such later date as may be established by City, under any of the following conditions:
  - a. If Developer or State fails to provide services called for by this Agreement within the time specified herein or any extension thereof.
  - b. If Developer or State fails to perform any of the other provisions of this Agreement, or so fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from City fails to correct such failures within ten (10) days or such longer period as State may authorize.
  - c. If Developer fails to provide payment of its share of the cost of the Project.
  - d. If federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited or State is prohibited from paying for such work from the planned funding source.
4. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.
5. Developer shall deliver to City and State all books, documents, papers, and records of Developer and City, respectively, which are directly pertinent to the Project and this Agreement within six (6) months of Project completion.
6. If any third party makes any claim or brings any action, suit or proceeding alleging a tort as now or hereafter defined in ORS 30.260 ("Third Party Claim") against State or City with respect to which the other Party may have liability, the notified Party must promptly notify the other Party in writing of the Third Party Claim and deliver to the other Party a copy of the claim, process, and all legal pleadings with respect to the Third Party Claim. Each Party is entitled to participate in the defense of a Third Party Claim, and to defend a Third Party Claim with counsel of its own choosing. Receipt by a Party of the notice and copies required in this paragraph and meaningful opportunity for the Party to participate in the investigation, defense and settlement of the Third Party Claim with counsel of its own choosing are conditions precedent to that Party's liability with respect to the Third Party Claim.
7. With respect to a Third Party Claim for which State is jointly liable with City (or would be if joined in the Third Party Claim), State shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by City in such

proportion as is appropriate to reflect the relative fault of State on the one hand and of City on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of State on the one hand and of City on the other hand shall be determined by reference to, among other things, the parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. State's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if State had sole liability in the proceeding.

8. With respect to a Third Party Claim for which City is jointly liable with State (or would be if joined in the Third Party Claim), City shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by State in such proportion as is appropriate to reflect the relative fault of City on the one hand and of State on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of City on the one hand and of State on the other hand shall be determined by reference to, among other things, the parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. City's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if it had sole liability in the proceeding.
9. The Parties shall attempt in good faith to resolve any dispute arising out of this Agreement. In addition, the Parties may agree to utilize a jointly selected mediator or arbitrator (for non-binding arbitration) to resolve the dispute short of litigation.
10. If City fails to maintain facilities in accordance with the terms of this Agreement, State, at its option, may maintain the facility and bill City, seek an injunction to enforce the duties and obligations of this Agreement or take any other action allowed by law.
11. This Agreement may be executed in several counterparts (facsimile or otherwise) all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.
12. This Agreement and attached exhibits constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind any Party unless in writing and signed by all Parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure

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of State to enforce any provision of this Agreement shall not constitute a waiver by State of that or any other provision.

**THE PARTIES**, by execution of this Agreement, hereby acknowledge that their signing representatives have read this Agreement, understand it, and agree to be bound by its terms and conditions.

**SIGNATURE PAGE TO FOLLOW**

**CITY OF TIGARD**, by and through its elected officials

By \_\_\_\_\_  
Mayor

Date \_\_\_\_\_

By \_\_\_\_\_  
Recorder

Date \_\_\_\_\_

**APPROVED AS TO LEGAL SUFFICIENCY**

By \_\_\_\_\_  
City Counsel

**WALMART REAL ESTATE BUSINESS TRUST**, a Delaware Statutory Trust, by and through its designated officials

By \_\_\_\_\_  
Director of Project Management

Date \_\_\_\_\_

**APPROVED AS TO LEGAL SUFFICIENCY**

By \_\_\_\_\_  
Developer Counsel

Date \_\_\_\_\_

**City Contact:**

Kim McMillan, PE  
13125 SW Hall Boulevard  
Tigard, OR 97223  
503-718-2642  
kim@tigard-or.gov

**Developer Contact:**

Steve Dyer - Walmart  
2001 SE 10<sup>th</sup> Street, Mail Stop 5570  
Bentonville, AR 72716  
479-273-4567  
steve.dyer@walmart.com

**STATE OF OREGON**, by and through its Department of Transportation

By \_\_\_\_\_  
Highway Division Administrator

Date \_\_\_\_\_

**APPROVAL RECOMMENDED**

By \_\_\_\_\_  
Technical Services Manager/Chief Engineer  
Date \_\_\_\_\_

By \_\_\_\_\_  
State Traffic Engineer

Date \_\_\_\_\_

By \_\_\_\_\_  
Region 1 Manager

Date \_\_\_\_\_

By \_\_\_\_\_  
Region 1 Project Services Manager

Date \_\_\_\_\_

By \_\_\_\_\_  
Region 1 Maintenance & Operations Manager  
Date \_\_\_\_\_

**APPROVED AS TO LEGAL SUFFICIENCY**

By \_\_\_\_\_  
Assistant Attorney General

Date \_\_\_\_\_

**State Contact:**

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EXHIBIT A - MISC. CONTRACTS AND AGREEMENTS #28599

SECTION 36, TOWNSHIP 1 SOUTH, RANGE 1 WEST, W.M.

SECTION 1, TOWNSHIP 2 SOUTH, RANGE 1 WEST, W.M.

